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No. 09-522

Supreme Court, U.S.
FILED
NOV 24 2009
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IN THE SUPREME COURT OF THE
UNITED STATES

RICHARD V. NOVAK AND
PATRICIA NOVAK,
Petitioners,

v.

TARA J. JABLONSKI, INDIVIDUALLY
AND AS ADMINISTRATRIX OF THE
ESTATE OF MICHAEL L. JABLONSKI,
DECEASED,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

---

RESPONDENT'S BRIEF IN OPPOSITION

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CERTIFICATION OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that Respondent's Brief in Opposition to Petition for Writ of Certiorari contains 1,569 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 24, 2009.

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CERTIFICATE OF SERVICE

In compliance with Supreme Court Rule 29.5(b), I certify that I have today caused to be served, by depositing with Fed Ex, for Standard Overnight Delivery, postage pre-paid, three true and correct copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari on all parties required to be served, as follows:

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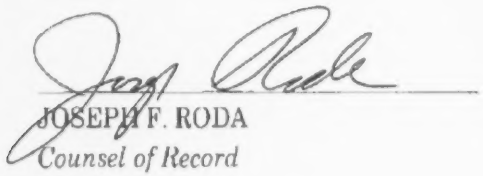

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DATED: November 24, 2009

QUESTION PRESENTED

Whether this Court should provide a definition of "judicial admissions" that must be applied by all state and federal courts, when Petitioner did not raise this issue in the courts below, and instead argued before the Supreme Court of Pennsylvania that the law on "judicial admissions" is "well-settled."

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BASIS FOR JURISDICTION IN THIS COURT

Petitioner's attempt to invoke the jurisdiction of this Court under Supreme Court Rules 10(b) and 10(c) is improper because Petitioner did not raise any issues of federal law in the courts below; the pertinent questions raised below instead related only to how to apply a well-settled state law.

STATEMENT OF THE CASE

This wrongful death and survival action arose from the April 30, 2001[1] death of Michael Jablonski, a thirty-three year-old husband and father of three. Petitioner Richard Novak struck and killed Mr. Jablonski with his truck when Mr. Jablonski was working on a traffic sign on the side of the road for the Pennsylvania Department of Transportation ("PennDOT"). (Record 306a-307a). Mr. Novak was driving with a suspended license. (Record 88a, at 42:12-16).

After the accident, the Commonwealth of Pennsylvania brought criminal charges against Mr. Novak under 75 Pa. C.S.A. § 3742.1: "Accidents involving death or personal injury while not properly licensed." (Record 302a).

During a preliminary hearing on January 30, 2002, Mr. Novak's criminal defense attorney opposed this charge by arguing that Mr. Novak had caused the accident by being "distracted," "inattentive" and

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[1] Petitioner has incorrectly stated on page two of his petition that the accident occurred on August 30, 2001.

"careless," and not by acting "recklessly" or "intentionally," which was required for criminal conviction. (Record 299a). His counsel said:

- "The question I would submit for the Court is whether the defendant caused an accident. Now, this taken in simple terms, **he did, of course, cause an accident.**" (Record 298a, at 79:19-22) (emphasis added).

- "Now, the conduct that the Commonwealth has provided for the defendant through their expert and other witnesses is inattentiveness. **He was inattentive.**" (Record 299a, at 81:21-23) (emphasis added).

- "I would submit, judge, the Commonwealth by the very fact they charged the defendant with careless driving shows his acts weren't reckless. **They were careless.**" (Record 299a, at 82:24-83:2) (emphasis added).

- "It is exactly what they said it was. Inattentiveness. **He was inattentive. He was distracted,** looked back and all of a sudden the vehicle was there and it was too late for him to do anything." (Record 299a, at 83:15-18) (emphasis added).

After the preliminary hearing, Mr. Novak's counsel filed a Motion to Quash Information/Petition for Writ of Habeas Corpus and stipulated that the

court should consider the entire preliminary hearing transcript. (Record 303a-304a). After reviewing the transcript, the court ruled that Mr. Novak's actions "constitute[d] mere negligence" (Record 315a), and dismissed the criminal charges. (Record 316a).

At the subsequent civil trial, the trial court deemed the above-quoted statements of Mr. Novak's criminal defense attorney to be judicial admissions. (Record 90a, at 50:16-52:13). Since those judicial admissions left no doubt that Mr. Novak's negligence caused Mr. Jablonski's death, the trial court precluded the submission of contradictory evidence (Record 103a-104a, at 3:12-7:9), and entered a directed verdict as to liability. (Record 124a, at 11:14-12:2).

There would have been no contradictory evidence to present, in any event, because despite what Mr. Novak has claimed on pages three and six of his petition, he did not contrarily testify in his deposition in the civil case that he had not been inattentive. Rather, Mr. Novak testified in his deposition that he took his eyes off the road, and by the time he looked back in front of him and realized the car in front of him had stopped, he could not stop in time. (Respondent Appendix A, at 9-13).[2] Mr. Novak hit the car in front of him, and then crushed Mr. Jablonski between the bumpers of his truck and

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[2] At the instruction of Mr. Baker from the United States Supreme Court, Respondent has included in her Appendices only the pertinent excerpts from the materials that were filed in the lower courts but were not included in the Reproduced Record from the Pennsylvania Superior Court proceedings.

the PennDOT vehicle that had been parked behind Mr. Jablonski, cutting Mr. Jablonski in half. (Id.)

Also contrary to what Mr. Novak has claimed in his petition, he did not preserve the issue that he is currently attempting to raise before this court.

Mr. Novak's current petition essentially argues that this Court needs to define "judicial admissions" because the current body of law is inadequate. In the courts below, however, Mr. Novak adopted Pennsylvania's definition of "judicial admissions," without criticizing that definition in any way. His arguments instead centered on his contention that the preliminary hearing statements by his criminal defense attorney did not meet that definition. His argument was so limited in:

- the motion *in limine* that he and his wife filed before trial, seeking to preclude the admission of the statements of Mr. Novak's attorney from the prior criminal case. (Record 64a-66a).

- the motion for post-trial relief that he and his wife filed. (Record 183a-186a; Record 253a-254a).

- the appeal that he and his wife filed with the Superior Court of Pennsylvania. (Respondent Appendix B, at 14-24).

- the petition for *en banc* reargument that he and his wife filed with the Superior Court of Pennsylvania. (Respondent Appendix C, at 25-34).

- The Petition for Allowance of Appeal that he and his wife filed with the Supreme Court of Pennsylvania. (Respondent Appendix D, at 35-45).

In fact, in the petition that Mr. and Mrs. Novak filed with the Supreme Court of Pennsylvania, they said the definition of judicial admissions was "well-established law in [that] jurisdiction." (Respondent Appendix D, at 36).

SUMMARY OF THE ARGUMENT

This Court should deny the Petition for Writ of Certiorari because Petitioner has failed to preserve the single issue raised in his petition before any of the courts below.

Independent of this, the petition should be denied because Petitioner has failed to justify stripping the states of their long-standing power to define and apply their own well-established laws relating to "judicial admissions."

ARGUMENT

Congress has given the United States Supreme Court the power to review "[f]inal

judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." *Howell v. Mississippi,* 543 U.S. 440, 443 (2005), *rehearing denied,* 544 U.S. 944 (2005) (quoting 28 U.S.C. § 1257(a)(emphasis added)).

Because of this statute and the statutes that preceded it, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review.'" *Id.* (quoting *Adams v. Robertson,* 520 U.S. 83, 86 (1997)).

In *Howell,* as here, the petitioner failed to cite any cases from the United States Supreme Court, the Federal Constitution, or any cases directly construing the Federal Constitution, in the relevant portion of the argument in his State Supreme Court brief. *Id.* As a result, this Court dismissed the writ of certiorari that had already been granted as improvidently granted. *Id.* at 443-446. *See also Adams,* 520 U.S. at 87-91 (rejecting writ because of failure to preserve issue below).

This Court should similarly reject the petition for writ of certiorari that has been filed here, given that Petitioner raised in the courts below only issues of how to apply well-established Pennsylvania state law, without mentioning the federal question he has attempted to raise here.

Lest Petitioner suggest that his issue is so important that it justifies review by this Court,

regardless of his failure to preserve the issue below, this Court has already rejected such an argument in *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001). In so ruling, this Court noted that "the importance of an issue should not distort the principles that control the exercise of our jurisdiction." *Id.*

This Court continued: "[B]y adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect . . . for the Court's adjudicary process." *Id.* (quoting *Adams*, 520 U.S. at 92 n.6). This Court added that this would "ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition." *Id.* at 110-111 (citation omitted).

Likewise, in *Adams*, this Court explained that "'it would be unseemly in our dual system to government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." 520 U.S. at 90 (citation omitted). In so ruling, this Court was preserving a state's "undeniable interest in having the opportunity to determine in the first instance whether its existing rules . . . satisfy the requirements of due process, and whether to exercise its power to amend those rules to avoid potential constitutional challenges." *Id.* (citations omitted).

Because Petitioner has filed to preserve the federal question that it is now attempting to raise for the first time, this Court should deny his petition for writ of certiorari. Independent of the failure to preserve the issue, this Court should deny the

petition also because Petitioner has failed to justify stripping the states of their long-standing power to define and apply their own well-established laws relating to "judicial admissions."

CONCLUSION

For the reasons described above, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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RESPONDENT APPENDIX A

TARA L. JABLONSKI,	:	IN THE COURT OF
INDIVIDUALLY AND	:	COMMON PLEAS
AS ADMINISTRATRIX	:	LANCASTER
OF THE ESTATE OF	:	COUNTY,
MICHAEL L.	:	PENNSYLVANIA
JABLONSKI,	:	
DECEASED,	:	
PLAINTIFF	:	
	:	
V	:	CIVIL ACTION - LAW
	:	C.A. NO. CI-03-01733
RICHARD V. NOVAK	:	
AND PATRICIA NOVAK,:		JURY TRIAL
DEFENDANTS	:	DEMANDED

DEPOSITION OF: RICHARD V. NOVAK

TAKEN BY: PLAINTIFF

BEFORE: DIANE F. FOULTZ, RMR
NOTARY PUBLIC

DATE: SEPTEMBER 1, 2005, 8:58 A.M.

PLACE: RODA NAST, P.C.
801 ESTELLE DRIVE
LANCASTER, PENNSYLVANIA

APPEARANCES:

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BY: ERIN C. BURNS, ESQUIRE

FOR – PLAINTIFF

THOMAS, THOMAS & HAFER, LLP
BY: C. KENT PRICE, ESQUIRE

FOR – DEFENDANTS

* * *

A And as the cattle truck came into the intersection or approached the intersection, he flowed right through, and I watched the black Volvo, and there was no slowing down. I didn't see any turn signal, and I assumed that she would flow through the intersection. Mr. Jablonski went from a standing position to a kneeling position within three feet of the road, and when he did, his stooping caught my attention, which my eyes went over to observe.

And when I looked back in front of me, I saw that there was only one car length now between me and the black Volvo, and I could – I perceived that the black Volvo had slammed its brakes on, at which point I went for my brake pedal as fast as I could and saw I was going to hit her, so I began swerving to the right thinking I'd maybe get stopped before I got to the PennDOT truck, but I was not able to.

Q Okay. So you hit your brakes?

A I went for the brakes, yes.

Q You went for the brakes. Did you – and you started to turn to the right –

A Correct.

Q – before you struck the back of the Volvo?

A Correct.

Q Okay. So you were partially turning when you hit the back of the Volvo?

A Yeah.

Q Do you remember what part of the Volvo you struck?

A It was the right rear.
Q Okay. And then you continued off to the right at which point you struck –
A Continued on and hit the left rear of the PennDOT truck, and the worker was pinched between my bumper and his bumper.
Q Okay. Do you remember anything else at all about the accident, anything you saw, anything else you did?
A Well, after the accident, you know, I wondered if the guy jumped out of the way or what happened. I didn't – you know, I couldn't see, and so my truck was partially stuck in gear, and I worked to get it into reverse and to back up a few feet, and then I got out of the truck and went around the front and I saw him laying on the highway, laying on the shoulder of the highway.
Q How close did you get to Mr. Jablonski?
A Maybe four feet.
Q Did you check for a pulse or see if he was breathing or anything like that?

A Well, he was cut in half in the area of his chest, and I figured that his heart would have been damaged, and I have never heard of anybody surviving when they have been cut in half, no.

* * *

RESPONDENT APPENDIX B

IN THE SUPERIOR COURT OF PENNSYLVANIA HARRISBURG DISTRICT

NO. 491 MDA 2007

TARA L. JABLONSKI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICAHEL L. JABLONSKI, DECEASED,

Appellees

v.

RICHARD V. NOVAK AND PATRICIA NOVAK,

Appellants

BRIEF OF APPELLANTS

Appeal from the Order of the Court of Common Pleas of Lancaster County, Pennsylvania, dated February 27, 2007 (docketed on February 28, 2007) docketed at CI-03-01733

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* * *

VII. ARGUMENT

A. DEFENDANTS ARE ENTITLED TO A NEW TRIAL DUE TO THE TRIAL COURT COMMITTING REVERSIBLE ERROR IN DENYING DEFENDANTS' MOTION TO PRECLUDE EVIDENCE OF PRIOR STATEMENTS BY RICHARD NOVAK'S CRIMINAL ATTORNEY DURING A PRELIMINARY HEARING, FOR FINDING THOSE STATEMENTS CONSTITUTED JUDICIAL ADMISSIONS, AND FOR DIRECTING A VERDICT IN FAVOR OF PLAINTIFF AS TO LIABILITY BASED ON SAME.

Based upon some statements made by Defendant Richard Novak's prior attorney during argument, at a preliminary hearing, in a criminal matter, the trial court in the instant matter took away from the jury the issue of negligence and causation, and instead, found as a matter of law, that Richard Novak was negligent and caused the

death of Plaintiff's decedent, Michael Jablonski. This was error on the part of the trial court and certainly affected the outcome of this case since Defendants never had the opportunity to present evidence as to the issues of negligence and/or causation. More importantly, the jury never had the opportunity to make a finding as to whether Defendant, Richard Novak, was negligent and caused the accident. Such error is not harmless and warrants this Court granting Defendants a new trial.

"A judicial admission is a formal waiver of proof that relieves an opposing party from having to prove the *admitted fact* and bars the party who made the admission from disputing it." *Reeder v. Workers' Comp. Appeal Bd. (Mercer Lime and Stone Co.)*, 871 A.2d 337, 340 (Pa. Commw. 2005) (emphasis added); *Katz v. Katz*, 163 A. 214, 216 (Pa. 1932); *Nasim v. Shamrock Welding Supply Co.*, 563 A.2d 1266, 1267 (Pa. Super. 1989), *appeal denied,* 577 A.2d 890 (Pa. 1990). "For an averment to qualify as a judicial admission, *it must be a clear and unequivocal* admission of ***fact***. Judicial admissions *are limited in scope to* ***factual matters*** otherwise requiring evidentiary proof, *and are exclusive of legal theories and conclusions of law.*" *John B. Conomos, Inc. v. Sun Co.*, 831 A.2d 696, 713 (Pa. Super. 2003), *appeal denied*, 845 A.2d 818 (Pa. 2004) (emphasis added). Moreover, an attorney's closing argument is not evidence. *See* Pennsylvania Standard Criminal Jury Instructions, 2.07; Pennsylvania Standard Civil Jury Instructions, 1.36.

In the instant case, Defendant Richard Novak's criminal defense attorney's statements, during a closing argument at a preliminary hearing, are not judicial admissions, and the trial court thus committed reversible error in denying Defendants' Motion in Limine on the issue and granting a directed verdict on the issue of liability to Plaintiff based on the alleged "judicial admissions". The criminal defense attorney for Defendant Richard Novak stated, in relevant part, during a closing argument at preliminary hearing arising out of a criminal charge related to the accident in question, as follows:

> I submit, your Honor, the Commonwealth has not shown that the defendant intentionally, knowingly, or recklessly caused the accident. In fact, quite to the contrary, the Commonwealth has shown that ***probably*** by inattentiveness ***the highest level*** they raise to is negligence. I would submit that their testimony doesn't even rise to criminal negligence in this case.
>
> * * *
>
> Now, the conduct that ***the Commonwealth*** has provided for the defendant through their expert and other witnesses is inattentiveness. He was inattentive. Now, basically it would sound that the inattentiveness was looking over at the PennDOT workers and then looking back at the roadway and suddenly realizing a vehicle was taking a left turn in front of him.
>
> * * *

There's certainly an argument that his driving was careless at this point. . .

(R. 299a) (emphasis added). Richard Novak's criminal defense attorney concluded his closing statement by stating:

> Again, under his standards the case means intentionally or knowingly or recklessly causes. To be constitutional, any one of those three levels of culpability must exist and in this situation, ***I submit the Commonwealth has shown***, quite to the contrary, that ***perhaps at best negligence exists*** but I would submit they haven't even shown criminal negligence, much less recklessness.

(R. 299a) (emphasis added).

The above statements by Defendant Richard Novak's criminal defense attorney are not "clear and unequivocal admissions of fact," and they are not judicial admissions. At best, read in their entirety, the statements of the criminal defense attorney amount to equivocal and ambiguous statements concerning Defendant Richard Novak's arguable negligence. Words to the effect of "probably," "perhaps at best," and "there's certainly an argument" are not clear and unequivocal as the use of such words is to qualify statements following the phrase.

Moreover, Defendant Richard Novak did not even testify at the preliminary hearing, and the statements by Defendant Richard Novak's criminal attorney do not even address facts, but rather are simply arguments concerning a legal conclusion. The criminal defense attorney was commenting,

during closing argument, on the evidence presented by the Commonwealth or lack thereof, not Defendant Richard Novak's testimony because he did not testify. In fact, three of the four comments by the criminal defense attorney are prefaced with "the Commonwealth has shown" or similar language.

The criminal defense attorney did not admit to any 'fact' in his closing argument, but rather was arguing how a District Justice should hold as a matter of law, i.e. a legal conclusion, concerning the fate of Defendant Richard Novak in a criminal proceeding. Simply put, the criminal attorney's statements are far from clear and unequivocal admissions of fact.

Plaintiff argued, and the trial court apparently incorrectly accepted, that Defendant Richard Novak "wants it both ways". The Plaintiff argued to the trial court that Richard Novak "wants to get out of the criminal case because he was only negligent but does not want that negligence admission and the finding of the criminal court to carry over to the civil side." Plaintiff's characterization of the criminal proceeding is misleading and lacks foundation.

Defendant Richard Novak never stated that he was negligent to avoid criminal prosecution. As previously stated, Defendant Richard Novak argued, via counsel, at the criminal proceeding that "the Commonwealth has shown that ***probably*** by inattentiveness" the accident occurred. (R. 299a) (emphasis added). Prior Counsel for Richard Novak also stated that "[t]here's certainly ***an argument*** that his driving was careless. . . ." (R. 299a)

(emphasis added). Additional, counsel for Richard Novak also stated that ". . . ***perhaps at best*** negligence exists but I would submit they haven't even shown criminal negligence, much less recklessness." (R 299a) (emphasis added).

Plaintiff mischaracterizes a description of evidence offered by the Commonwealth as an admission. Richard Novak's criminal counsel also explained that "the conduct that the Commonwealth ***has provided for*** the defendant ***through their expert and other witnesses*** is inattentiveness. He was inattentive." (R. 299a) (emphasis added). Richard Novak's criminal counsel was explaining that the Commonwealth's witnesses seemed to indicate that Richard Novak was "inattentive". Mr. Novak's counsel did not declare or admit that Richard Novak was "inattentive" by commenting on what the Commonwealth appeared to have offered into evidence. When coupled with counsel's statements regarding "probably by inattentiveness", "[t]here's certainly an argument that his driving was careless", and "perhaps at best negligence exists", no question is left that counsel for Defendant Richard Novak at the criminal proceeding did not make any factual declarations that Defendant Richard Novak was, in fact, negligent in causing the accident. Assuming *arguendo*, that an individual did have a question concerning what counsel for Defendant Richard Novak said at the preliminary hearing, a finding that criminal defense counsel's statements were judicial admissions is still unfounded because the statements are not clear and unequivocal admissions of fact. *See John B. Conomos, Inc.*, 831 A.2d at 713 (explaining that to qualify as a judicial

admission the statement "must be clear and unequivocal").

It further is anticipated that Plaintiff will incorrectly argue, as she did to the trial court, that collateral estoppel applies in the instant matter to preclude Defendant Richard Novak from contesting his alleged negligence in causing the accident. However, collateral estoppel applies only if:

> (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 954 (Pa. Super. 1992).

Plaintiff contends that the habeas corpus proceeding and decision rendered by the Honorable Judge Lawrence F. Stengel concerning Defendant Richard Novak's criminal case presents an estoppel issue precluding Defendant Richard Novak from contesting his alleged negligence in causing the automobile accident. Plaintiff's contention has no merit.[3]

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[3] Plaintiff's argument that "[t]he determination that Mr. Novak's actions constituted 'negligence' was essential to Judge Stengel's determination that the 'Commonwealth failed to

Collateral estoppel only serves to bar the re-litigation of issues that were previously adjudicated and were indispensable, material, and necessary to the prior determination. *Pilgrim Food Products Co. v. Filler Products, Inc.*, 143 A.2d 47, 49 (Pa. 1958); *Schoepple v. Lower Saucon Township Zoning Hearing Bd.*, 624 A.2d 699, 706 (Pa. Commw. 1993). Collateral estoppel does not apply to any incidental or collateral matters or to factual findings that are irrelevant to the determination or judgment. *Thal v. Krawitz*, 73 A.2d 376, 377 (Pa. 1950); *Atterberry v. Smith*, 522 A.2d 683, 687 (Pa. Commw. 1987).

In the instant matter, as noted by Judge Stengel in his Opinion, Defendant Richard Novak was charged with a criminal offense that required, at a minimum, a finding of recklessness to sustain a conviction. (R. 313a). Judge Stengel, in *dicta*, gratuitously opined that "[t]hese actions constitute mere negligence," in reference to Richard Novak's actions, but then properly concludes that his actions "do not rise to the level of recklessness." (R. 315a). As can be seen from Judge Stengel reasoning in his Opinion, whether Defendant Richard Novak's actions on the day of the accident were negligent or not was not even material to making the determination in the criminal case. (R. 308a-315a). In other words, whether Richard Novak was

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satisfy its burden of establishing the element of intentionally, knowingly or recklessly causing the accident that resulted in the death of the PennDOT worker in this case,'" it is utterly non-sequitar and argument ad ignoratium. Simply because the Commonwealth could not establish recklessness, does not establish that Defendant Richard Novak was negligent.

negligent was not material to or necessary for the determination of Richard Novak's entitlement to habeas corpus relief or his criminal culpability. In fact, Judge Stengel's references to "negligence" were irrelevant and incidental to the ultimate finding that Defendant Richard Novak was not reckless on the day of the accident. Simply put, whether Defendant Richard Novak was "reckless", was not and is not dependent on Richard Novak being found "negligent".

Furthermore, the issue to be decided in the prior case, the criminal case, was not identical to the one presented in the instant civil case. The criminal matter concerned itself with whether or not Defendant Richard Novak intended to cause the accident, knowingly caused the accident, or recklessly caused the accident, not whether Defendant Richard Novak was negligent in causing the accident.[4] No determination was ever made that Defendant Richard Novak was negligent. The only reference to negligence was that at most the Commonwealth's argument and witnesses testified that Defendant Richard Novak was negligent. Richard Novak, through his attorney, argued only that the testimony at the preliminary hearing, *at most*, amounted to negligence. Hence, collateral

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[4] It also should be noted that in order for collateral estoppel to apply Defendant Richard Novak must have had a full and fair opportunity to litigate the issue in the prior proceeding. As addressed above, Richard Novak did not have a full and fair opportunity to litigate "negligence" because negligence was not even an element of the offense he was charged with by the Commonwealth.

estoppel is not a bar to Defendant Richard Novak contesting negligence in the instant matter.

When the trial court permitted these alleged "judicial admissions" to become part of the record and to become conclusive evidence of Defendant Richard's negligence, the trial court prejudiced Defendants and committed an error of law. Defendants should at least have had the opportunity to present evidence and argument that Defendant Richard Novak was not negligent.

The trial court noted that "[t]hose statements and the evidence which had been elicited was clearly sufficient to support the entry of directed verdict." *See* p. 5 of Appendix "E". However, what the trial court ignores is the fact that a directed verdict is only permissible if the facts are clear and free from doubt, and that in determining same, the trial court must consider the facts in the light most favorable to the nonmoving party. *Lonasco*, 757 A.2d at 375. Defendants were entitled to have a jury make a determination as to these issues. To preclude Defendants from offering evidence to contradict Plaintiff's claim of negligence and causation, and direct a verdict in favor of Plaintiff as to same, based solely on a equivocal, legal argument, made by Defendant Richard Novak's criminal attorney in another matter, is an error in law that may only be remedied by granting Defendants a new trial.

* * *

RESPONDENT APPENDIX C

IN THE SUPERIOR COURT OF PENNSYLVANIA HARRISBURG DISTRICT

NO. 491 MDA 2007

TARA L. JABLONSKI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL L. JABLONSKI, DECEASED,

Appellees

v.

RICHARD V. NOVAK AND PATRICIA NOVAK,

Appellants

APPELLANTS' PETITION FOR *EN BANC* REARGUMENT BY THE COURT

Appeal from the Order of the Court of Common Pleas of Lancaster County, Pennsylvania, dated February 27, 2007 (docketed on February 28, 2007) docketed at CI-03-01733

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* * *

I. POINTS OF FACT OR LAW OVERLOOKED OR MISAPPREHENDED BY THE PANEL AND REASONS FOR REAGRUMENT

A. The panel's decision that statements made by Richard Novak's criminal defense attorney during argument at a preliminary hearing constituted "judicial admissions" and, therefore, Richard Novak was properly precluded from offering any evidence in defense of the allegations of liability in the civil case (App. A at 4-7), was based on (1) a misunderstanding of the facts of record surrounding the alleged judicial admissions and (2) a disregard of or misapplication of the law set forth by another panel of this Court in the case *John B. Conomos, Inc. v. Sun Co.*, 831 A.2d

696 (Pa. Super. 2003), *appeal denied*, 845 A.2d 818 (Pa. 2004).

As a consequence of the subject motor vehicle accident, Richard Novak was charged with violating 75 Pa.C.S.A. § 3742.1 of the Vehicle Code for causing Mr. Jablonski's death while driving with a suspended license, a felony of the third degree. Because that section of the Vehicle Code did not establish the degree of culpability necessary to establish a material element of the offense, attorney J. Richard Gray ("Attorney Gray"), on behalf of Richard Novak, argued at the preliminary hearing that Section 302(c) of the Crimes Code applied and, therefore, the Commonwealth had to prove Mr. Novak acted intentionally, knowingly or recklessly in order to make out a *prima facie* case. It was in this context of presenting a criminal defense that Attorney Gray argued that, *in the absence of any evidence having been advanced by Mr. Novak,* the very best the Commonwealth had proven was negligence but not intentional, knowing or reckless conduct. When examined in that context, *all* of Attorney Gray's arguments could be reasonably viewed as being prefaced parenthetically by the phrase "assuming for purposes of argument" or words of a similar import, which lawyers routinely employ when presenting arguments to courts.

The panel appears to have examined the alleged "factual" statements made by Attorney Gray without properly considering them within the actual context in which they were asserted. The statements which the panel accepted as "judicial

admissions" of liability binding upon Richard Novak, were made by Attorney Gray who argued during the criminal hearing that *the Commonwealth, at best, had only proven that Richard Novak was negligent*, and that such actions did not rise to the level necessary to constitute a crime, i.e. intentional, knowing or reckless conduct. A copy of the transcript from the criminal hearing is attached hereto as Appendix "C". Every single alleged "judicial admission" as to liability, to which the panel cited in its Memorandum Opinion, when read in light of the entire argument being made by Attorney Gray, was simply an *argument* and in no respect an admission of *fact*. *Compare* statements cited to by the panel on page six of its Memorandum Opinion, Appendix "A", to the actual transcript from the preliminary hearing, Appendix "C".

The panel also appears to have either misapplied or disregarded another panel's decision in the case *John B. Conomos, Inc.* v. *Sun Co.*, 831 A.2d 696 (Pa. Super. 2003), *appeal denied*, 845 A.2d 818 (Pa. 2004). In *John B. Conomos*, the panel, Judges Hudock, Lally-Green and Cavanaugh, held that a statement will not be considered a "judicial admission" unless it is a clear and unequivocal admission of ***fact***. *Id.* at 713. The panel in *John B. Conomos* explained what "clear" and unequivocal" meant by the following:

> Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and ***conclusions of law***. *Glick*, 458 F.2d at 1291. The fact must have been

unequivocally admitted and not be merely one interpretation of the statement that is purported to be the judicial admission. *Jones v. Constantino*, 429 Pa. Super. 73, 631 A.2d 1289, 1293-40 (Pa. Super. 1993) (finding no admission where "the evidence could be reasonably construed to admit of more than one meaning"); *see also Phila. Reinsurance Corp. v. Employers Ins. of Wausau*, 61 Fed. Appx. 816, 2003 U.S. App. LEXIS 6198 (3d Cir. 2003) ("An unequivocal statement is one that is clear, unambiguous and expresses only one meaning"); *Glick*, 458 F.2d at 1291; *The Doyle*, 105 F.2d 113, 117 (3d Cir. 1989) (holding that "admissions to be binding must be unequivocal, . . . and anyway *they may be disregarded in the interests of justice*"). An admission is not conclusively binding when the statement is indeterminate, inconsistent, or ambiguous. *Greater Valley Terminal Corp. v. Goodman*, 405 Pa. 605, 176 A.2d 408, 410 (Pa. 1962); *Dible v. Vagley*, 417 Pa. Super. 302, 612 A.2d 493, 499 (Pa. Super. 1992) (finding no admission in a statement in which "pronouns are burdened with ambiguous antecedents, and syntax is opaque" and that "to be an admission, a statement must at least be intelligible [and its] subject matter . . . readily determinable"); *Astrazeneca AB v. Mutual Pharm. Co.*, 250 F. Supp. 2d 506, 518 (E.D. Pa. 2003). When there is uncertainty surrounding a conceded fact, it is the role of the judge or jury as fact finder to determine which facts have been adequately proved and

> which must be rejected. *See Oscanyan v. Arms Co.*, 103 U.S. 261, 263-64, 26 L. Ed. 539 (1880).

Id. (emphasis added).

Although the panel in this case concluded that the statements made by Attorney Gray were "clear" and unequivocal", this conclusion is contrary to what the panel in *John B. Conomos* held ***must*** be demonstrated before a statement will be deemed "clear" and "unequivocal" and, thus, a "judicial admission". Every quote cited to by the panel in the instant appeal in support of its affirmation that Novak admitted liability in the criminal hearing is open to more than one reasonable interpretation. For example, the panel cites, "[n]ow, the conduct that the Commonwealth has provided for the defendant through their expert and other witnesses is inattentiveness. *He was inattentive.* (App. A at 6)(emphasis added by the panel). This quote can easily be interpreted to mean that Attorney Gray was commenting on *what the Commonwealth was arguing* through its witnesses – inattentiveness as compared to reckless or intentional conduct. In other words, Attorney Gray was merely saying that *for the purposes of argument* the most that the Commonwealth had proven was that Richard Novak was inattentive; this statement can in no way be interpreted as a "clear and unequivocal" admission of fact as to negligence or liability. Moreover, the quote "[n]ow this taken in simple terms, *he did, of course, cause an accident*" (App. A at 6)(emphasis added by panel), may be reasonably interpreted to mean nothing more than that Richard Novak caused

the accident without the statement constituting an admission of fault, i.e. negligence, inasmuch as causation does not equate to negligence. The mere happening of an accident is not evidence or proof of negligence. *Treadway v. Ebert Motor Co.*, 436 A.2d 994, 997-998 (Pa. Super. 1981). The same is true of the other citations on page six (6) of the panel's Memorandum Opinion.

The panel also failed to acknowledge the following comments by Attorney Gray which clearly show that his comments were equivocal, ambiguous and merely being offered as argument rather than admission:

1. "the Commonwealth has shown that ***probably*** by inattentiveness the highest level they raise [sic] to is negligence. I would submit that their testimony ***doesn't*** even rise to criminal negligence in this case." (App. C at 81)(emphasis added).

2. "the Commonwealth by the very fact they charged the defendant with careless driving shows his acts weren't reckless. They were careless. There's certainly ***an argument*** that his driving was careless at this point . . . ." (App. C at 82-83) (emphasis added).

3. "I submit the Commonwealth has shown, quite to the contrary, that ***perhaps at best*** negligence exists but I would submit they haven't even shown criminal negligence, much less recklessness." (App. C at 84)(emphasis added).

The other dispositive error made by the panel in deciding that the comments made by Attorney Gray constituted "judicial admissions" is that *almost every single statement referred to is an argument as*

to the law, not a fact. Only admissions of ***fact*** can be deemed "judicial admissions". *See John B. Conomos*, 831 A.2d at 713. The single quote cited to by the panel which can *arguably* relate to a factual admission is Attorney Gray's argument that "[i]t isn't a gross deviation from the standard of conduct that a person, reasonable person would observe in his situation. It is exactly what they said it was. Inattentiveness. He was inattentive. He was distracted, looked back and all of a sudden the vehicle was there and it was too late for him to do anything." (App. A at 6)(emphasis added). However, these comments made by Richard Novak's criminal defense attorney during argument are far from clear admissions of fact and can easily be interpreted in multiple ways. For example, read in the context within which they were made, these statements can reasonably be interpreted to convey, at the most, negligence on the part of Mr. Novak, which was simply not enough to convict. It is also far from evident that a simple statement, by itself, of inattentiveness, without any opportunity to explain the reason for the alleged inattentiveness, can be equated with a factual admission strong enough to support a legal admission of negligence. As the panel in *John B. Conomos* emphasized, when in doubt, the statement should not be deemed a "judicial admission". *Id.*

The isolated statements that the panel found to be "judicial admissions" of liability are grossly inadequate to constitute "clear" and "unequivocal" statements of ***fact*** as required in the case of *John B. Conomos, supra.* The panel's failure to recognize that the statements made by Attorney Gray in the

criminal hearing were merely by way of argument, ambiguous and, at best, open to more than one reasonable interpretation, deprived Richard Novak of his right and opportunity to defend himself against the allegations of liability during the civil trial of this matter. Attorney Gray simply was arguing what criminal defense attorneys argue on a daily basis, i.e. that although the Commonwealth may have produced evidence of a lesser standard, i.e. negligence, it did not produce evidence to meet the higher burden of proof in a criminal case. Because of the purported "judicial admissions" of liability, the trial court improperly denied Novak of his "day in court" and usurped the jury's role as the sole fact finder.

The panel's decision is contrary to the facts of record and this Court's prior decisions, including *John B. Conomos, supra,* and therefore, Defendants respectfully request that this Court grant *en banc* reargument as to this issue.

* * *

III. CONCLUSION

The panel of this Honorable Court considered the statements made by Richard Novak's criminal defense attorney during argument in a criminal hearing, out of their proper context, and found them to be "judicial admissions" as to liability. This finding by the panel disregarded another panel's decision in which it was explained that for a statement to be considered a "judicial admission", it must be as to a fact, and not be open to more than one reasonable interpretation, i.e. "clear" and

unequivocal". This finding by the panel essentially deprived Richard Novak of the opportunity to defend himself as to the allegations of liability asserted by Plaintiffs. Whether or not such a defense would have been successful is not relevant, but rather, what is important is that Defendants were denied this right based on ambiguous statements that under no circumstances should have been construed to be "judicial admissions" as to liability.

* * *

RESPONDENT APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
NO._____

TARA L. JABLONSKI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICAHEL L. JABLONSKI, DECEASED,

Respondents

v.

RICHARD V. NOVAK AND PATRICIA NOVAK,

Petitioners

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal by Richard V. Novak and Patricia Novak from a final Order of the Superior Court dated July 2, 2008, at Docket No. 491 MDA 2007, which affirmed the Order of the Court of Common Pleas of Lancaster County, Pennsylvania, dated February 27, 2007, (docketed on February 28, 2007) docketed at CI-03-01733

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* * *

V. CONCISE STATEMENT OF THE REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

A. The Superior Court's decision that statements made by Richard Novak's criminal defense attorney during argument at a preliminary hearing constituted "judicial admissions", despite those statements not being clear and unequivocal, so that Defendants were denied the right to defend themselves against the allegations of liability in this case, is in direct conflict with well-established law in this jurisdiction, and is such a departure from accepted application of the law regarding "judicial

admissions", as to call for the exercise of this Court's supervisory authority.

In this case, the Superior Court panel's interpretation of the law as to "judicial admissions" is inconsistent with, and contrary to, well-established precedent and resulted in Defendants being deprived of the opportunity and right to defend themselves against allegations of negligence. This Court should accept review in order to clarify or re-emphasize the importance of statements of fact needing to be unequivocal and clear in order to be considered "judicial admissions". Otherwise, litigants are deprived of the right to have their "day in court", simply because of *arguments* made in other proceedings.

A "judicial admission" is a device by which a trial may be expedited by elimination of the need for proof as to certain issues. *Durkin v. Equine Clinics, Inc.*, 546 A.2d 665, 669 (Pa. Super. 1988), *appeal denied*, 569 A.2d 1367 (Pa. 1989). A "judicial admission" is in essence a confession, concession, waiver or stipulation by a party, and as such, that party is not permitted to explain or contradict the "admission". *Id.* at 670. As such, common sense dictates, and our appellate courts have required, that in order for a statement to be deemed a confession or stipulation, it must be clear and unequivocal. *John B. Conomos, Inc. v. Sun Co.*, 831 A.2d 696 (Pa. Super. 2003), *appeal denied*, 845 A.2d 818 (Pa. 2004). (App. E).

In *John B. Conomos*, a panel of the Superior Court correctly held that a statement will not be

considered a "judicial admission" unless it is a clear and unequivocal admission of ***fact***. *Id.* at 713. The panel in *John B. Conomos* explained what "clear" and "unequivocal" meant by the following:

> Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and ***conclusions of law***. *Glick*, 458 F.2d at 1291. The fact must have been unequivocally admitted and not be merely one interpretation of the statement that is purported to be the judicial admission. *Jones v. Constantino*, 429 Pa. Super. 73, 631 A.2d 1289, 1293-40 (Pa. Super. 1993) (finding no admission where "the evidence could be reasonably construed to admit of more than one meaning"); *see also Phila. Reinsurance Corp. v. Employers Ins. of Wausau*, 61 Fed. Appx. 816, 2003 U.S. App. LEXIS 6198 (3d Cir. 2003) ("An unequivocal statement is one that is clear, unambiguous and expresses only one meaning"); *Glick*, 458 F.2d at 1291; *The Doyle*, 105 F.2d 113, 117 (3d Cir. 1989) (holding that "admissions to be binding must be unequivocal, . . . and anyway *they may be disregarded in the interests of justice*"). An admission is not conclusively binding when the statement is indeterminate, inconsistent, or ambiguous. *Greater Valley Terminal Corp. v. Goodman*, 405 Pa. 605, 176 A.2d 408, 410 (Pa. 1962); *Dible v. Vagley*, 417 Pa. Super. 302, 612 A.2d 493, 499 (Pa. Super. 1992) (finding no admission in a statement in which "pronouns are burdened with ambiguous

> antecedents, and syntax is opaque" and that "to be an admission, a statement must at least be intelligible [and its] subject matter . . . readily determinable"); *Astazeneca AB v. Mutual Pharm. Co.*, 250 F. Supp. 2d 506, 518 (E.D. Pa. 2003). When there is uncertainty surrounding a conceded fact, it is the role of the judge or jury as fact finder to determine which facts have been adequately proved and which must be rejected. *See Oscanyan v. Arms Co.*, 103 U.S. 261, 263-64, 26 L. Ed. 539 (1880).

Id. (emphasis added).

Here, despite citing to the case *John B. Conomos*, above, the Superior Court panel did not follow the law in that case in determining that statements made by Richard Novak's criminal defense attorney during argument are "judicial admissions". The panel appears to have examined the alleged "factual" statements made by Richard Novak's criminal defense attorney J. Richard Gray ("Attorney Gray"), without properly considering them within the actual context in which they were asserted. When considered within the actual context in which they were made, the statements which were deemed to have been "judicial admissions", really are far from "confessions" or "stipulations".

The statements, which the panel accepted as "judicial admissions" of liability binding upon Richard Novak, were made by Attorney Gray who argued during a criminal hearing that *the Commonwealth, at best, had only proven that Richard Novak was negligent,* and that such actions

did not rise to the level necessary to constitute a crime, i.e. intentional, knowing or reckless conduct. (App. D). Every single alleged "judicial admission" as to liability, to which the panel cited in its Memorandum Opinion, when read in light of the entire argument being made by Attorney Gray, was simply an *argument* and in no respect an admission of *fact*. (*Compare* statements cited to by the panel on page 6 of its Memorandum Opinion, Appendix B, to the actual transcript from the preliminary hearing, Appendix D).

Specifically, the statements were made during a criminal proceeding which was a consequence of the subject motor vehicle accident at issue. Defendant Richard Novak, was charged with violating 75 Pa.C.S.A. §3742.1 of the Vehicle Code for causing Mr. Jablonski's death while driving with a suspended license, a felony of the third degree. Because that section of the Vehicle Code did not establish the degree of culpability necessary to establish a material element of the offense, Attorney Gray, on behalf of Richard Novak, argued at the preliminary hearing that Section 302(c) of the Crimes Code applied and, therefore, the Commonwealth had to prove Mr. Novak acted intentionally, knowingly or recklessly in order to make out a *prima facie* case. 18 Pa.C.S. §302(a). It was in this context of presenting a criminal defense that Attorney Gray argued that, *in the absence of any evidence having been advanced by Mr. Novak*, the very best the Commonwealth had proven was negligence, but not intentional, knowing or reckless conduct. When examined in that context, *all* of Attorney Gray's arguments could be reasonably

viewed as being prefaced parenthetically by the phrase "assuming for purposes of argument" or words of a similar import, which lawyers routinely employ when presenting arguments to courts.

Although the panel in this case concluded that the statements made by Attorney Gray were "clear" and "unequivocal", this conclusion is contrary to what the panel in *John B. Conomos* held ***must*** be demonstrated before a statement will be deemed "clear" and "unequivocal" and, thus, a "judicial admission". Every quote cited to by the panel in the instant appeal in support of its affirmation that Richard Novak admitted liability in the criminal hearing is open to more than one reasonable interpretation.

For example, the panel cites, "[n]ow, the conduct that the Commonwealth has provided for the defendant through their expert and other witnesses is inattentiveness. *He was inattentive.*" (App. B at 6) (emphasis added by panel). This quote can easily be interpreted to mean that Attorney Gray was commenting on *what the Commonwealth was arguing* through its witnesses – inattentiveness as compared to reckless or intentional conduct. In other words, Attorney Gray was merely saying that *for the purposes of argument* the most that the Commonwealth had proven was that Richard Novak was inattentive; this statement can in no way be interpreted as a "clear and unequivocal" admission of fact as to negligence or liability.

Moreover the quote "[n]ow this taken in simple terms, *he did, of course, cause an accident*" (App. B at 6) (emphasis added by panel), may be

reasonably interpreted to mean nothing more than that Richard Novak caused the accident, without the statement constituting an admission of fault, i.e. negligence, inasmuch as causation does not equate to negligence. The mere happening of an accident is not evidence or proof of negligence. *Treadway v. Ebert Motor Co.*, 436 A.2d 994, 997-98 (Pa. Super 1981). The same is true of the other citations on page 6 of the panel's Memorandum Opinion. (App. B at 6).

The panel also failed to acknowledge the following comments by Attorney Gray which clearly show that his comments were equivocal, ambiguous and merely being offered as argument rather than admission:

1. "the Commonwealth has show that ***probably*** by inattentiveness the highest level they raise [sic] to is negligence. I would submit that their testimony ***doesn't*** even rise to criminal negligence in this case." (App. D at 81) (emphasis added).
2. "the Commonwealth by the very fact they charged the defendant with careless driving shows his acts weren't reckless. They were careless. There's certainly ***an argument*** that his driving was careless at this point . . . ." (App. D at 82-83) (emphasis added).
3. "I submit the Commonwealth has shown, quite to the contrary, that ***perhaps at best*** negligence exists but I would submit they haven't even shown criminal negligence, must less recklessness." (App. D at 84) (emphasis added).

The Superior Court panel's decision that the statements made by Attorney Gray were "judicial admissions" also was contrary to well-settled law because *almost every single statement referred to by Attorney Gray was an argument as to the law, not a fact.* Only admissions of ***fact*** can be deemed "judicial admissions". *John B. Conomos*, 831 A.2d at 713. The single quote cited to by the panel which can *arguably* relate to a factual admission is Attorney Gray's argument that "[i]t isn't a gross deviation from the standard of conduct that a person, reasonable person would observe in his situation. It is exactly what they said it was. Inattentiveness. He was inattentive. He was distracted, looked back and all of a sudden the vehicle was there and it was too late for him to do anything." (App. B at 6) (emphasis added).

These comments made by Richard Novak's criminal defense attorney during argument are far from clear admissions of fact and can easily be interpreted in multiple ways. For instance, read in the context within which they were made, these statements can reasonably be interpreted to convey, at the most, negligence on the part of Mr. Novak, which was simply not enough to convict. It also is far from evident that a simple statement, by itself, of inattentiveness, without any opportunity to explain the reason for the alleged inattentiveness, can be equated with a factual admission strong enough to support a legal admission of negligence. As the Superior Court in *John B. Conomos* emphasized, *when in doubt, the statement should not be deemed a "judicial admission". Id.* (emphasis added).

The isolated statements that the panel found to be "judicial admissions" of liability are grossly inadequate to constitute "clear" and "unequivocal" statements of ***fact*** as required in the case of *John B. Conomos*, above. The panel's failure to recognize that the statements made by Attorney Gray in the criminal hearing were merely by way of argument, ambiguous and, at best, open to more than one reasonable interpretation, deprived Richard Novak of his right and opportunity to defend himself against the allegations of liability during the civil trial of this matter. Attorney Gray simply was arguing what criminal defense attorneys argue on a daily basis, i.e. that although the Commonwealth may have produced evidence of a lesser standard, i.e. negligence, it did not produce evidence to meet the higher burden of proof in a criminal case. Because of the purported "judicial admissions" of liability, the trial court improperly denied Mr. Novak his "day in court" and usurped the jury's role as the sole fact finder.

It is submitted that this Court should accept review in order to address the Superior Court panel's serious deviation from well-settled law as to a legal rule, "judicial admissions", which if not applied very narrowly and conservatively, robs litigants of their right to defend themselves. This type of expansion of a narrow rule of law by our appellate courts negatively impacts future litigants, also, since this issue is likely to be raised on future appeals in other cases.

For these reasons, Defendants respectfully request that this Court accept review of the issue of

the limits and scope of the rule of "judicial admissions".

* * *